IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Page

Page

Statutes and Regulations:

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The Chamber represents its members in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1] The instant case is of vital concern to the large number of Chamber members who rely upon testing in selecting or promoting employees — a reliance which enables employers not only to fulfill their obligation under Title VII of the Civil Rights Act of 1964 to ensure an objective selection process, but also to minimize the risk of selecting unqualified personnel to perform jobs vital to an employer's operations.

The value of testing as an objective employee selection device in American industry and government has been con-

[1] *E.g., Buffalo Forge v. Steelworkers*, 428 U.S. 397 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

firmed by several comprehensive studies, including surveys conducted by the Personnel Policies Forum in September, 1976 (PPF Survey #114, p. 1 (BNA, 1976) and by the United States Civil Service Commission[2] in December, 1977. The decision below, if allowed to stand, will pose significant, if not insuperable, obstacles to the continuation of the extensive testing program of Chamber members.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

STATEMENT OF FACTS

The Detroit Edison Company ("the Company") is a public utility engaged in the generation and distribution of electric power in the State of Michigan. Since approximately 1943, the Union[3] has represented various employees of the Company in approximately 28 bargaining units, including a unit composed of operating and maintenance employees in the production department of the Company's Monroe power plant. Since its certification in the Monroe unit on April 1, 1971, the Union has entered

[2]Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[3]Local 223, Utility Workers Union of America, AFL-CIO (hereafter, "the Union").

into two successive collective bargaining agreements covering the operating and maintenance employees, the second of which was executed on July 3, 1972.

In late 1971, the Company determined to fill six unit positions in the Instrument Man B classification — a job whose duties include the maintenance of instrumentation vital to the plant's operation. Among the posted requirements for the Instrument Man B position was a minimum of "recommended" on a battery of aptitude tests administered by Company-employed psychologists.[4] The ten Monroe employees who bid for the position were rejected[5] because they failed to achieve a "recommended" score on a test battery which was first developed by the Company in 1958, "refined" in 1969-1970, and twice validated by the Company's industrial psychologists.[6]

On January 17, 1972, the Union filed a grievance under the collective bargaining agreement protesting the Company's reliance upon the test results to deny the Monroe bidders promotion to Industrial Man "B".[7] During the initial steps of the grievance procedure, the Union

[4]The other listed qualifications included high school credits for two years of mathematics and one year of science and a satisfactory physical examination and attendance record. The only selection standard challenged by the Union was the aptitude test.

[5]Five of the six positions were filled by the five most senior applicants who did achieve a "recommended" score; the sixth position was taken by an incumbent Instrument Man from another location.

[6]The Instrument Man test battery was revalidated in 1969-1970, at the suggestion of the technical engineers of the Company's power plants. In 1972 the battery was reviewed by an outside consultant, the National Compliance Company ("NCC"), in conjunction with its revalidation studies of 15 additional job test batteries utilized by the Company. It should be specifically noted that the validity of the test has not in the past and is not now in question.

[7]The collective bargaining agreement requires that promotions be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different. . . ."

requested the Company to furnish the test scores of the Monroe applicants — a request declined by the Company. While also denying the grievance, the Company offered to confer with the Union "to enhance their understanding of the Company's objectives in the testing area" — an offer which the Union rejected as "completely unacceptable." Accordingly, the Union requested arbitration of the grievance on October 27, 1972.

Thereafter, on March 5, 1973[8] the Union requested for the first time the following information: (1) the actual battery of tests; (2) the method of scoring and the criteria for establishing the "cut-off" score of 10.3; (3) a report on the test validation; and (4) the report of the National Compliance Company. In response to the Union's request, the Company arranged a meeting on April 2 to explain to the Union the entire testing program and procedures. The Company also furnished the Union with the validation studies for the Instrument Man B test battery conducted by both the Company's psychologists and the NCC. The Company declined, however, to provide the Union the test batteries, the actual test papers or the actual test scores of the applicants, as a consequence of which the Union, on April 4, filed with the National Labor Relations Board ("NLRB" or "Board") an unfair labor practice charge, alleging that the refusal to provide the requested information violated the Company's duty to bargain in good faith (Section 8(a)(5)).

While the charge was pending before the NLRB, hearings were conducted before Arbitrator Jones on May 23, 30 and 31. At the outset of the May 23 hearing, the Union requested that the Arbitrator require the Company to supply copies of the test. During the hearing, the Company offered to supply the following information:

[8]All dates hereafter refer to "1973", unless otherwise indicated.

1. Its 1970 validation study.
2. The 1972 NCC report.
3. Explanations of the tests utilized.
4. Representative sample questions.

Also during the hearing, the Company offered to administer the test battery to the Union's representative and to disclose the test scores of employees who did not object to their release — an offer rejected by the Union. Finally, the Company revealed the examinees' test scores without linking them to the applicants' names.

After the close of the original arbitration hearings, the Union — notwithstanding the extensive information provided or offered by the Company — reiterated its request for "the actual tests, scores and weights." By letter dated July 10, the Company, while again declining to furnish either the actual test battery or scores linked to individual names, responded affirmatively and in detail to the Union's request concerning the battery weights and scoring mechanisms. On July 23, Arbitrator Jones ruled that he was not authorized under the contract to compel the Company to furnish the information, although he invited the Union to produce case citations for the contrary proposition — an invitation declined by the Union. Four days later the Union and Company agreed that the Arbitrator should proceed to decide the merits of the grievance without the requested information, subject to the Union's right to reopen the arbitration proceeding "if the Company ever in fact is ordered to . . . disclose the actual tests as a result of a final court order." Accordingly, on December 3, the Arbitrator ruled that the Company did not violate the collective bargaining agreement by establishing an acceptable score on the test battery as a qualification for the Instrument Man B position, but directed the Company to re-examine the three employees with scores between 9.3 and 10.3. Upon re-examination, one employee was promoted to the Instrument Man job; two were again rejected.

PROCEEDINGS BELOW

On the basis of the foregoing, the Board concluded that the Company's failure to furnish the Union with the requested information violated Section 8(a)(5) and (1) of the Act. As remedy therefor, the Board (Member Kennedy, dissenting) ordered the Company to supply the Union with copies of the test battery, the applicants' test papers, and the applicants' test scores linked to individual names. In so ordering, the Board majority rejected the Administrative Law Judge's recommendation that the Company be required to deliver copies of the test battery, including the applicants' actual test papers, only to a "qualified psychologist" selected by the Union.

The Sixth Circuit (Circuit Judge Weick, dissenting) enforced the Board's order, rejecting the Company's contentions that disclosure to the Union could destroy the utility of the tests, require the Company's industrial psychologists to breach their professional ethical code, and invade the privacy of the employees whose test scores the Company is also required to divulge. Subsequently, on November 22, 1977, the Sixth Circuit denied a petition for rehearing filed by the Company. The Company thereupon filed with this Court a Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

A NOVEL QUESTION OF THE INTERPLAY BETWEEN THE NLRA AND TITLE VII IS PRESENTED

It is well settled that the National Labor Relations Act ("NLRA" or "Act") must be construed "in light of the broad national labor policy of which it is a part"[9] — including, of course, the national commitment to eradicate employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Simply stated, the National Labor Relations Board ("NLRB") cannot make decisions which have an impact on other employment legislation without carefully accommodating one scheme to another. Indeed, the Board must administer the Act in a manner

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[9] *Emporium Capwell Co. v. Western Addition Commun. Org.*, 420 U.S. 50, 66 (1975). Compare *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) in which this Court cautioned the Board:

> "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

The NLRB itself has elsewhere acknowledged that the NLRA "cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme." *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975).

supportive of the overall legislative program. *Southern Steamship Co. v. NLRB, supra.*

The decision below, requiring employers to grant unions access to their aptitude tests,[10] will threaten the very ability of companies to use such tests since the tests' security is critical to their usefulness. Obviously if some individuals who ultimately will be taking the test have advance knowledge of the questions, the utility of the test will be destroyed. "The obvious security problem is to avoid having applicants know the test questions in advance. To maintain security, tests not in use should be kept under lock and key . . . Test security also implies a necessity for keeping tests out of the hands of people who are not competent to use them properly."[11]

The latter point is, of course, a critical issue in this case. Rather than order the tests to be delivered to an industrial psychologist chosen by the Union, the Board ordered that the test materials be given to the Union itself. While a psychologist is under professional and ethical obligations not to reveal the tests to non-experts, there is no practical constraint on the union's disclosure. Under the Board's decision, Detroit Edison will have no reasonable assurance that the tests' security will long be maintained — a circumstance which leaves the company little choice but to abandon the use of tests altogether, thus thwarting its efforts to develop objective, nondiscriminatory selection standards which conform to the requirements of Title VII.

[10]In addition, if carried to its logical conclusion, the Sixth Circuit result may also compel employers to disclose to unions supervisory evaluations, hiring interview reports or similar documents which may be considered "tests" under the Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures.* 29 C.F.R. §1607.

[11]Guion, R.M. *Personnel Testing,* 1965, p. 504.

Accordingly, in defining the scope of the employer's obligation under Section 8(a)(5) of the Act to furnish information that may assist the union in performing its representative functions, the Board must consider the potential impact of its orders upon implementation of the Congressionally-mandated equality of employment opportunity — a goal which is facilitated by reliance upon properly validated and administered aptitude or ability tests. See, *e.g.*, Section 703(h) of Title VII of the Civil Rights Act,[12] Equal Employment Opportunity Commission ("EEOC") *Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607.1(a) (". . . [P]roperly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . in the development and maintenance of and efficient work force and . . . the utilization and conservation of human resources generally"). See also *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-34; *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 430-31 (1975) (EEOC testing guidelines are entitled to "great deference").

[12]Section 703(h), which expressly authorizes an employer to administer and "act upon the results" of nondiscriminatory, professionally developed ability tests, was a response to *Myart v. Motorola, Inc.* (reproduced in its entirety at 110 Cong. Rec. 5662-64 (March 19, 1964)), a decision by a hearing officer of the Illinois Fair Employment Practices Commission which, in the view of proponents of 703(h), jeoparized the continuance of employer testing programs:

> ". . . [Myart] is highly unreasonable, because if title VII were administered in this fashion, it would mean that an employer would be denied the means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion." (Remarks of Senator Tower (R. Tex.) at 110 Cong. Rec. 13, 492 (June 11, 1964)).

See also the exchange between Senators Fulbright (D. Ark) and Ellender (D. La.), printed at 110 Cong. Rec. 9599-9600 (April 29, 1964). In short, the legislative history of Section 703(h) discloses a vital interest in protecting employer reliance upon properly validated tests in determining employment conditions.

Even a cursory analysis of the decisions below reflects a failure to accommodate the policies of the NLRA and Title VII. Thus, Section 8(a)(5) has never previously been construed to require an employer to disclose to unions aptitude tests or test scores achieved by named applicants. In fact, the General Counsel, citing the impact of a disclosure requirement upon the utility of tests, previously refused even to issue a complaint. *International Telephone and Telegraph, Federal Division*, 22-CA-499, 46 LRRM 1387 (1960). Cf. NLRB GC Adm. Rul. No. SR-477, 46 LRRM 1252 (1960) (Company was justified in refusing to comply with union's request for information concerning proposed aptitude tests in light of oral explanation of their purpose). Nor is the Board's construction of Section 8(a)(5) required or even contemplated by *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) which, as detailed below (pp. 11-15), defines the appropriate inquiry of the NLRB under the "good faith" requirement of Section 8(a)(5) in evaluating an employer's refusal to provide requested information. Moreover, as noted above, the significance under Title VII of properly validated and administered tests as a nondiscriminatory, objective determinant of employment conditions can scarcely be disputed. Compare *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 432-433; *Senter v. General Motors Corporation*, 532 F.2d 511, 529 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976), and cases cited at n.57. Thus, the NLRB should have weighed the importance of employer compliance with the EEOC testing guidelines, which extend far beyond paper and pencil tests, against the importance of union access to information which is of little benefit to the union or its members. The national labor policy in favor of open and good faith bargaining is hardly impaired by maintaining the privacy and confidentiality of the test materials in question. In short, the failure of the Board and Sixth Circuit to evaluate the "good faith" requirement in light of Title VII's policy to promote an objective selection process, of which "job-related" tests are an integral part, alone justifies intervention by this Court.

II

THE DECISION BELOW CONFLICTS WITH *NLRB v. TRUITT*

In *NLRB v. Truitt, supra*, this Court, while concluding that an employer violated Section 8(a)(5) by declining to produce requested financial data to substantiate a claimed inability to afford a wage increase, cautioned:

> "We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts [footnote omitted]. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met" (351 U.S. at 153-154).

As underscored by the dissenting Justices, the Board applied a wrong standard in ruling that the employer's failure to supply the requested financial information constituted a *per se* refusal to bargain in good faith. Subsequently, this Court confirmed that under *Truitt* a refusal to supply information is merely *evidence* of bad faith. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487 (1960). See also *Shell Oil Company v. NLRB*, 457 F.2d 615, 618 (9th Cir. 1972) ("The Board asserts that once information is shown to be relevant to the Union's performance of its role as bargaining representative, this fixes the duty of the Company to produce and any failure to produce is *per se* an unlawful refusal to bargain. However, this is not the law."); *Kroger Co. v. NLRB*, 399 F.2d 455, 457, 458 (6th Cir. 1968) (*Truitt* requires consideration of the "circumstances of the particular case" and a balancing of the

"conflicting" interests at stake). See, generally, Fanning, *The Obligation To Furnish Information During The Contract Term*, 9 Ga. L.Rev. 375, 376 (1975) ("It is important to note that the [*Truitt*] Court was not making a *per se* finding.").[13]

Notwithstanding *Truitt*, the NLRB and court below failed either to consider the "circumstances of the particular case" or to balance the conflicting interests at stake. Indeed, the Company's violation of Section 8(a)(5) flowed automatically from the determination that the requested information was arguably "of value to the Union in fulfilling its responsibility to the employees". The competing interests disregarded below included: (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy. In response to the Company's argument that unauthorized disclosure would invalidate the aptitude tests, the Board, with the approval of the court below, merely "restricted" the *Union* from disclosing their contents to employees — a restriction which dissenting Judge Weick termed "really naive" and which, in addition, conflicts with *Kirkland v. Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975) (Nothing in Title VII requires or authorizes an "advance review" by minority applicants of the examination for the position to which they seek promotion). A threshold difficulty with a mere "restriction" is that nothing in the Board's court-enforced *order* requires the Union not to publicize the tests or their results; accordingly, the availability of a contempt sanction, we submit, is at best speculative. Indeed, even assuming the Board's

[13] *NLRB v. Acme Industrial Company*, 385 U.S. 432, 435-36 (1967) confirmed the employer's obligation to furnish the union information "necessary" to the performance of its statutory responsibilities, but did not disturb *Truitt's* rejection of a *per se* analysis of the "good faith" issue.

willingness to initiate contempt proceedings against the Union,[14] the court, we submit, lacks jurisdiction to enter a contempt judgment against a nonparty "whose rights have not been adjudged according to law" *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 ((1945); *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 436 (1934); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930).[15] However, even if the union were adjudged in contempt for a violation of the "restriction", the Company is denied an adequate remedy since the tests will have been invalidated and revalidation of a test battery requires years and could again be defeated by a recalcitrant union official.

[14] *Amalgamated Utility Wkrs. v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940), establishes that the Board has exclusive standing to institute contempt proceedings for failure to comply with a court-enforced Board order. Moreover, the institution of contempt proceedings, although dependent upon formal authorization by the Board, may be "short-circuited" by the General Counsel to whom the Board has delegated the discretionary authority to determine whether or not to seek contempt. See, generally, Bartosic and Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 University of Chicago L.Rev. 225, 259-261 (1972). In any event, the Board itself has displayed a reluctance to pursue vigorously the contempt remedy. Bartosic and Lanoff, *supra*, at pp. 256-257. In light of the Board's contempt record, the Company can scarcely anticipate that the Board will authorize — or, indeed, that the General Counsel will even seek — contempt against a party which neither committed an unfair labor practice nor was otherwise on notice that its legal relationships were being adjudicated.

[15] In *Alemite* the court had enjoined Staff's employer from infringing Alemite's patent: after the injunction issued, Staff severed his relationship with his former employer and infringed the patent. In maintaining that Staff was not in contempt of the injunction issued against his former employer, the Second Circuit noted that "it is not the act described which the decree may forbid, but only that act when the defendant does it" (42 F.2d at 833). By the same token, even if the Union could be "enjoined", the injunction would not bind a *former* official, who could publicize the tests with impunity. *Harvey v. Bettis*, 35 F.2d 349, 350 (9th Cir. 1929).

Apart from the jeopardy to the Company's testing program, the Board and court below similarly disregarded the interests of the industrial psychologists and the examinees. Thus, as dissenting Judge Weick noted, the psychologists' disclosure of the aptitude test battery constitutes a violation of their profession's Code of Ethics and exposes the psychologists to disciplinary sanction, including suspension or even revocation of their licenses. For example, the "Standards for Educational and Psychological Tests and Manuals", published by the American Psychological Association ("APA") and recognized by the EEOC testing guidelines, impose upon psychologists who administer tests a responsibility — shared with the test developer or distributor — to maintain test security. In addition, Standard J2 of the APA Standards limits disclosure of test scores to individuals "qualified to interpret them". The Comment to J2 denies "test score" access to "curious peers" — among whom, we submit, may be included the employees represented by the Union.

Finally, the employees who are examined by the Company's psychologists, and with whom they enjoy a confidential and privileged relationship, have an unquestioned interest in privacy which neither the Board nor court below evaluated. Compare *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 168 (D. D.C. 1976) ("The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance evaluations, and personal preferences and goals, and the reasons, for an employee's termination contained in . . . [affirmative action plans] would constitute a substantial invasion of the companies' employees' personal privacy"). Accord: *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 298 (C.D. Cal. 1974); *Westinghouse Electric Corporation v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974), aff'd 542 F.2d 1190 (4th Cir. 1976). Apart from a right of privacy granted

under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, Congress has also recognized a privacy interest of students and parents under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232(g), to prevent the release of education records, including grades, test scores or "personally identifiable" information. See also the Rules and Regulations of the Department of Health, Education and Welfare, 45 C.F.R. §99.30. The prohibition against the release of test scores — albeit in an "education", rather than employment, context — reflects a Congressional interest in minimizing perceived invasions of privacy. Indeed, the Board, while generally rejecting a privacy or confidentiality defense to a refusal to furnish requested information,[16] has itself invoked an invasion of employee privacy to resist disclosure of the names and addresses of employees eligible to vote in NLRB elections — information requested under the FOIA by law professors engaged in a NLRB voting study. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). In rejecting the Board's privacy defense, the *Getman* court pointed out:

> "[A]lthough a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed [footnote omitted] in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. . . . The giving of names and addresses is a very much lower degree of disclosure; in them-

[16] *E.g., Aluminum Ore*, 39 NLRB 1286, 1297 (1942); *Electrical Mfg. Co.*, 173 NLRB 878, 880 (1968). Compare, however, *McCulloch Corporation*, 132 NLRB 201, 207 (1961) in which the Board, citing a potential "breach of confidence," sustained the employer's refusal to disclose in negotiations a wage survey of its competitors who had provided the wage data only upon assurances that the information would remain confidential.

> selves a bare name and address give no information about an individual which is embarrassing" (450 F.2d at 674-675).

In contrast, the challenged disclosure of test scores of named applicants is potentially *very* "embarrassing" — an embarrassment which is obviously not justified by a misperceived benefit to the Union from disclosure of the test data.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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